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No. 94-355

In the Supreme Court of the United States

OCTOBER TERM, 1994

TOMMY L. ROBERTSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether petitioner was denied effective assistance of counsel.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-16a) is reported at 39 M.J. 211. The opinion of the Air Force Court of Military Review (now called the Air Force Court of Criminal Appeals) (Pet. App. 17a-29a) is reported at 34 M.J. 1206.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 31, 1994. The petition for a writ of certiorari was filed on August 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

Petitioner was convicted by a general court-martial with members, of using cocaine, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. The Air Force Court of Military Review affirmed. Pet. App. 17a-29a. The Court of Military Appeals granted review on certain issues and affirmed. *Id.* at 1a-16a.

1. Petitioner tested positive for cocaine during a urinalysis drug test and was charged with use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. 912a. At trial before a general court-martial with members, petitioner contended that he ingested the cocaine when he drank a beer in which, unbeknownst to him, his roommate had put the cocaine. The government's expert witness, Dr. Wallace, testified that in light of the amount of cocaine found in petitioner's urine, petitioner would have had to have ingested a "near fatal" amount at the time of the alleged inadvertent ingestion, 66 hours before the test. Pet. App. 3a.

Petitioner was convicted and sentenced to be discharged from the service with a bad-conduct discharge, to be confined for six months, to forfeit all pay and allowances for six months, and to be reduced to the lowest enlisted grade. Pet. App. 2a, 18a n.1. Petitioner was represented at trial by two attorneys, a civilian lawyer and a detailed military defense counsel. When the military judge asked which defense counsel would be handling petitioner's post-trial representation, the civilian defense counsel indicated that he would be handling it. *Id.* at 25a.

The staff judge advocate submitted the government's post-trial recommendations to the commander who had convened the court-martial and who had the responsi-

bility for acting on the sentence, approving it as adjudged, reducing it, or disapproving it altogether. See Pet. App. 24a-25a; Art. 60, UCMJ, 10 U.S.C. 860; R.C.M. 1107. The government attempted to serve the recommendations on both counsel, but the military lawyer refused service. Civilian counsel requested a 36-day extension of time within which to respond. While that request was denied, an eight-day extension was granted. During that period, petitioner filed a written statement of comments on the trial, but his counsel did not file anything. The staff judge advocate filed an addendum replying to petitioner's comments. Pet. App. 14a, 25a-26a. The commander approved the sentence as adjudged. *Id.* at 18a n.1.

2. Petitioner appealed, challenging two evidentiary rulings, the instructions on findings, and the effectiveness of the post-trial representation he received. Pet. App. 18a. The Air Force Court of Military Review affirmed. It found that the evidentiary rulings constituted harmless error (*id.* at 18a-24a), and that petitioner had waived any challenge to the instructions (*id.* at 24a).

With regard to petitioner's claim of ineffective assistance of counsel in violation of the Sixth Amendment, the court found that defense counsel had failed to provide competent post-trial representation. The court observed that petitioner's civilian counsel did not appear to be familiar with post-conviction procedures and that his military counsel appeared to have "quit too soon." Pet. App. 27a. The court also concluded, however, that petitioner failed to make the requisite showing that he suffered prejudice to entitle him to relief. The court pointed out that petitioner's counsel on appeal did not bring to the court's attention "what other matters he would have submitted to the convening authority, had he

been helped as he should have been," and that petitioner did not inform the court "that he instructed his counsel to prepare or submit anything." *Id.* at 28a. The court reviewed the matters that petitioner had submitted and found that "they raise nothing which would have been likely to result in any relief from the convening authority." *Ibid.* The court also "examined the entire record for legal error, factual sufficiency, and matters affecting the appropriateness of the sentence," and found nothing that "would have warranted any relief" if it had been "brought to the convening authority's attention." *Id.* at 28a-29a.

3. Petitioner sought further review by the Court of Military Appeals. That court granted review on three issues: two evidentiary rulings and petitioner's claim that the Air Force Court of Military Review erred in holding that petitioner suffered no material prejudice as a result of inadequate post-trial assistance of counsel. Pet. App. 2a-3a. The Court of Military Appeals affirmed. It agreed with the Court of Military Review that one of the evidentiary rulings constituted harmless error and it found that petitioner did not establish error with regard to the other evidentiary ruling. *Id.* at 4a-14a.

In assessing the claim of ineffective assistance, the Court of Military Appeals applied the two-prong test of *Strickland* v. *Washington*, 466 U.S. 668 (1984). The court reviewed the various actions that a military defendant's counsel can take concerning review by the convening authority and found that petitioner had not met his burden of demonstrating that counsel "did not exercise reasonable diligence in submitting post-trial matters for [petitioner]." Pet. App. 15a. It noted that under *Strickland*'s presumption of an attorney's competence, petitioner had the burden of showing that his counsel was deficient and that the deficiency prejudiced

petitioner. The court concluded that petitioner had not carried that burden. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4-6) that he was denied effective assistance of counsel. He asserts (Pet. 5) that he was "denied assistance of counsel altogether" because counsel did not submit any post-trial or clemency matters. Accordingly, he claims that there should be a presumption of prejudice in his case.

The Court of Military Appeals and the Court of Military Review correctly rejected petitioner's claim of ineffective assistance of counsel. The two-prong test of *Strickland* v. *Washington*, 466 U.S. 668 (1984), required petitioner to demonstrate that his counsel's performance was so deficient that he was not functioning as counsel within the meaning of the Sixth Amendment, and that his counsel's deficient performance prejudiced petitioner. See also *United States* v. *Scott*, 24 M.J. 186 (C.M.A. 1987); *United States* v. *Barnard*, 32 M.J. 530 (A.F.C.M.R. 1990); *United States* v. *Moses*, 26 M.J. 980 (A.F.C.M.R. 1988); *United States* v. *McCarty*, 25 M.J. 667 (A.F.C.M.R. 1987); *United States* v. *Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987). Even at this late date, petitioner has not identified anything that should have been submitted as post-trial matters that would have made any difference in the outcome of petitioner's case. The courts below correctly concluded that petitioner has not met his burden of showing that he was prejudiced as a result of any lack of diligence by counsel in making post-trial submissions.

Petitioner attempts to recharacterize (Pet. 4-5) his claim as a claim of denial of counsel altogether, so that a presumption of prejudice applies. Petitioner was not denied counsel altogether, however; he was represented

by a civilian attorney who, he claims, rendered inadequate assistance. His case does not come within the scope of the principles set forth in *Perry* v. *Leeke*, 488 U.S. 272 (1989), and *Geders* v. *United States*, 425 U.S. 80 (1976), as he suggests (Pet. 5), because those cases concerned direct governmental interference with the right to counsel. See *Perry* v. *Leeke*, 488 U.S. at 279. No such interference is alleged in petitioner's case; rather his claim goes to the quality of the performance of the counsel who was representing him. In fact, petitioner's counsel sought and obtained an extension of time within which to file post-trial matters. Whether the failure of petitioner's counsel ultimately to submit any such matters was deficient and whether that failure prejudiced petitioner were questions for the reviewing courts to resolve under *Strickland*.

Petitioner is not assisted by *United States* v. *Spurlin*, 33 M.J. 443 (C.M.A. 1991) (Pet. 5). There, the court could not "categorically say that the [convening] authority might not have been swayed" if he had seen the post-trial submissions. 33 M.J. at 445 (quoting *United States* v. *Siders*, 15 M.J. 272, 274 (C.M.A. 1983)). Here, however, the Court of Military Review specifically reviewed the entire record and the matters submitted by petitioner and found that he raised nothing that would have been likely to warrant any relief from the convening authority. See Pet. App. 28a-29a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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